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In the

Supreme Court of the United States

JANUARY TERM, A.D. 1965

No. 930

PAULYNE B. MCCALL, as the Administratrix of the Estate of VIRGIL C. MCCALL, Deceased, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

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THE ARGUS PRESS, SEATTLE, WASHINGTON

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PAULYNE B. McCALL, as the Administratrix of the Estate of VIRGIL C. McCALL, Deceased, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

To the Honorable Supreme Court of the United States:

Your petitioner respectfully shows as follows:

a) **Referring to the official and unofficial reports of the courts below,** at this date such have not been published. However, Appendices hereto contains findings and conclusions of District Court and the opinion of Circuit Court.

b) Concise Statement of Grounds on which the Jurisdiction of this Court is involved:

(i) November 25, 1964, is the decision of the Ninth Circuit Court of Appeals decision as to date and entry at San Francisco, California (less than 90 days ago).

(ii) Statutory provision believed to confer on this court jurisdiction is: 28 U.S.C.A. Sec. 2101(c); May 24, 1949, Chapter 139, Sec. 109, 63 Stat. 104.

c) Questions Presented for Review:

1. Whether the character of the activity being performed by an employee should be more determinative as to respondeat superior liability under state law rather than military designations of "leave," "furlough" or "in line of duty" in cases involving the Federal Tort Claims Act (FTCA).

2. Whether the decision made by the Ninth Court of Appeals in this case was in conflict with the decisions of the Fourth and Fifth Courts of Appeal on the same federal question where a serviceman is en route to a new duty station "in line of duty" under Standard Transfer Orders without deviation in his own specifically authorized vehicle with reference to the liability of the United States?

3. Whether or not the Court of Appeals erred in affirming the District Court's ultimate conclusion on respondeat superior purportedly based upon liberal Washington State law tests considering the predominate motive and dual purpose doctrines?

d) Constitutional Provisions, Treaties, Statutes, Etc.

There are no constitutional provisions, treaties, or ordinances affecting the review of this case; however, there are several statutes. The principal statute is set forth in the appendix hereto, being what is commonly called the Federal Tort Claims Act (FTCA), 62 Stat. 933, 928, 982, which is also in Sec. 1346(b), 2674 and 2671 of Title 28, U.S.C. showing original jurisdiction.

In addition thereto, 10 U.S.C., Sec. 501, 802, 911, line 37 and 6011; Further the recognition by the enactment of Congress of public law 88-132, effective October 1,

1963, being 37 U.S.C., Sec. 203, otherwise referred to as the "Uniform Services Pay Act" increasing the pay of the Armed Forces, and note therefrom the reasons for enactment.

e) Concise Statement of the Case

I. The facts are not in dispute in this case; only the ultimate findings and conclusions of respondeat superior liability stemming from such facts:

On March 31, 1963, Ray E. Grantham, an employee of the United States (See 28 U.S.C., Sec. 2671 in appendix RI-56 Findings 20, 21 and 22) negligently killed Virgil C. McCall, a Boeing Airplane Company engineer-chemist. Decedent had been changing a tire on the shoulder of the Tacoma-Seattle Freeway in the State of Washington and was struck by Grantham's motor vehicle. Such auto had been specifically authorized as to its use. (See RI-71, Exhibit 1) pursuant to Standard Transfer Orders, transferring Grantham from his prior duty station, the USS CORAL SEA in Alameda, California, to his new duty station on board the USS BON HOMME RICHARD in Bremerton, Washington.

II. Damages were awarded and apportioned to the wife and the six minor children of decedent in the total of $176,114.30.

The District Court (RI-56, 60) in Memo Opinion as indicated in the appendix awarded damages and apportioned them in the event that the case should be remanded.

III. There was no deviation of route by the servant, Grantham, as he proceeded pursuant to orders from his master and he was not engaged in any "frolic of his own," and was in "line of duty" as to his military status at the time and place of the accident and was taking leave solely to effectuate his transfer:

The court held that if the court erred as to the finding of no respondeat superior liability due to leave status and thus the employee not within the scope of his employment (Finding 6, RI-60), then the court found that the employee was not engaged in a "frolic of his own" in traveling from Tacoma to Seattle rather than taking the Narrows Bridge from Tacoma to Bremerton, and at all times material there was no deviation by him (RI-60). The sister of Grantham had persuaded him to remain at her home the evening of the accident on Sunday, March 31, rather than report to his new duty station as had been his original intention (RII-52).

Government counsel admitted at the Circuit Court argument that Grantham was *"in line of duty"* as to his Naval status at the time of the travel and this was further found in the Pre-Trial Order (RI-17, 18) and there was uncontroverted testimony that said employee was subject to all such rules (RII-187) and the Court took judicial notice of this fact (RI-60). See 28 U.S.C., Sec. 2671, in the appendix where the definition of *"in line of duty"* and its meaning *"acting within the scope of employment"* as to Armed Service personnel.

IV. Transfer of Grantham and his exchange with Dela Cruz was for the benefit oft he Navy and in furtherance of his master's interest and at the time of the accident said employee was engaged in the performance of duties required undr his contract of employment:

The retention of qualified, experienced, career petty officers is *the major problem* of the Navy today (RII-203) and see the appendix as to the congressional concern as per public law 132, 37 U.S.C., Sec. 203, effective 1 October, 1963, especially as indicated in the testimony in the Pacific Fleet where the actual on-board count does not fill the complement (RII-198, 199) and there was testimony that this "SWAP" program of the Navy had to continue if the Navy was to continue as a volunteer service (RII-199, 233).

This *"SWAP"* or *"Exchange of Duty Type Transfer"* (RII-157, 158, 189) *initiated and promulgated by the government,* was set up to assist in the retention of qualified, experienced personnel, and such personnel were required to go on leave to effect such transfer.

The "policy" italicized in the original Navy document known as the Enlisted Transfer Manual admitted in the lower court are referred to as "highly beneficial" from a morale standpoint but not justifiable in view of the expenditure of government funds required, but is *still desirable* from the *Navy's viewpoint.* See also BuPers Manual, Articles C5307 (RI-9) which is the governing directive, that there was a positive endorsement of the commanding officers of both individuals recommending as to the desirability of the exchange from the government's standpoint (RI-14, 26).

In addition, commenting on the evidence as to this particular employee who had an outstanding record in the past (RII12, 13) and had taken Navy ships through four overhaul periods during his career (RII-13), the court commented on the evidence (RII-13, 14): **"I can take judicial knowledge, Mr. Smith, that this man, upon his transfer, was going to be of benefit to the Navy."**

The evidence at trial from Capt. Robie, the government's witness, was that it takes nine to ten years to train a Storekeeper First Class as this experienced employee was by on-the-job training, and that there was a cost factor to have the Navy retain a career-minded experienced first class petty officer (RII-200). This would mean approximately $276,000.00 saving — see Appendix. This career sailor had met all of the various detailed requirements (RI-59), his record was inspected by the Navy which specifically approved of his request and found it to their benefit (RII-178), prior to the time his Standard Transfer Orders were issued.

Grantham was at all times subject to the Uniform Code of Military Justice, Article 2 (RI-59, E. 36 of the Appendix) and he knew that he was under an obligation to follow the requirements of the said Code (RII-21), since it was one that was explained to him upon re-enlistment and he knew that he had to obey the orders once he logged off his ship (RII-17), and he had agreed specifically as a volunteer (Exhibit A-2, RI- 73) to pay his own cost of travel and to take leave to effectuate this travel in accordance with the provisions of the no-cost transfer and exchange program, with no other way than to put him on leave for the limited period

that the travel might involve to effectuate such no-cost transfer exchange or "SWAP" (RII-193).

V. Federal District Court in wrong death claims act has original jurisdiction (28 U.S.C. 1346(b), 62 Stat. 933)

f) Direct and Concise Argument

AMPLIFYING REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

I. The Character of the Activity Being Performed by an Employee Rather Than His Official Military Status Should Be Determinative as to Respondeat Superior Liability of Armed Service Personnel in Cases Involving the Federal Tort Claims Act.

As indicated in 45 Minn. Law. Rev., the subject of the Government Liability for Torts of Military Personnel Under the Federal Tort Claims Act written in 1960, indicates at page 281:

> "The Court ought to look at **the character of the activity being performed and not to its official status.** Only this type of inquiry will assure the government bears all costs incident to maintaining an Army. If the Army, simply by designating a soldier 'on leave' or 'on pass' could enable the United States to escape vicarious liability for its torts, the purpose of the FTCA would be frustrated, contrary to 28 U.S.C., Sec. 2674 which requires the nature of the servant's conduct not labels of 'pass' or 'leave.' " (Emphasis supplied)

Page 279 inquiring why the United States should be liable in such case, the rationale being:

A. The cost of doing business.

B. 28 U.S.C., Sec. 2671 and 2674 requiring United

States to be treated as a private individual or corporation.

C. The fact that the United States can spread the risk. See especially the case of *Rayonier, Inc. v. U.S.*, 352 U.S. 315, 1 L.Ed.2d 357, 77 S.Ct. 374, 7 L.Ed.2d 492.

D. There is tort liability as to the official movement of military personnel due to order, and this is the cost of maintaining an Army (or Navy) chargeable to the United States.

This decision by the Ninth Circuit again confirmed *Chapin v. U.S.* and is in conflict with the decision of the Fourth Circuit in *Cooner v. U.S.* (4CCA 1960, 276 F.2d 220) and the decision of the Fifth Circuit in *Hinson v. U.S.* (5CCA 1958, 257 F.2d 178) on the same federal question.

The instant case was decided by the District Court Judge on the basis of *Chapin v. U.S.* (9CCA 1958, 258 F.2d 465) as indicated in his memorandum opinion which was: ***The statutory law of California, being California Civil Code, Sec. 2338, where there was a summary judgment on liability and the facts were stipulated, which was not the case in our instance. At no time did the appellant nor petitioner here ever concede that the California Code Section had any applicability whatsoever to the law of the State of Washington.***

The *Chapin* case again was mentioned in the Circuit Court's affirmance, which is part of the Appendix hereto and which states: "in effect, the *Chapin approach* could deny the plaintiff the right to recover from the United States when a soldier—rather than a civilian—caused the injury, a result not intended by

the act. . . . " Page 277 of 45 Minn. Law Review states that "the distinction made in *Chapin* is not sound, for the right to control present in the military situation is found in the civilian situation and the existence of the master-servant relationship would be clear."

Cooner v. U. S. (4 CCA 1960, 276 F.2d 220) in effect states (note: District Court here chose dissenting opinion):

> "The Court must determine the concept or right of control as a legal amount of factual issue and the said case found such logically from the UCMJ and the employment relation."

The Fifth Circuit has done likewise in the case of *Hinson v. U.S.*, 270 F.2d 178 (5th Cir. 1958), wherein again military control satisfied the control requirement of New York Law, and "*differences arise from philosophical divergencies in federal courts.*"

It should be noted that the *Chapin* case in its recognition was decided on the basis of all those cases which were earlier than the Supreme Court landmark case of *Williams v. U. S.* (1955, 350 U.S. 859, 100 L.Ed. 761, 76 S.Ct. 100), as indicated in 1 L.Ed.2d, page 1657:

> "Earlier rulings contrary to the rule of the *Williams* case cited above, must, of course, be viewed as lacking authoritative weight.
>
> "As representatives of such decisions, see *U.S. v. Sharp* (1951 CCA 4, 123 F.Supp. 65, affirmed in 189 F.2d 239); *Paly v. U. S.* (1954 DC My.), 125 F.Supp. 798, affirmed in 221 F.2d 958; *Jozwish v. U. S.* (DC Ohio) 123 F.Supp. 65; *U. S. v. Eleazer* (4 CCA 149) 177 F.2d 914." (Note: These are *Chapin* basis!)

II. The United States Shall Be Liable Respecting Tort Claims in the Same Manner and to the Same Extent as a Private Individual Under Like Circumstances. See 28 USCA, Sec. 2674, on Such Liability in Appendix.

The late Roscoe Pound wrote in 30 NACCA Law Journal, pages 404 to 421, "Tort Claims Act—Reason or History":

> "The Federal Tort Claims Act *has* created a unique and 'novel and unprecedented' act unknown in common law."

He cited the cases of *Rayonier, Inc., v. U. S.,* 352 U.S. 315 (1957 cited above), and *Indian Towing Company v. U. S.,* 350 U.S. 61 (1955), in favor of that proposition. Note that the *Chapin* case uses exactly the contrary language in its rationale and creates an area of *"special sovereign immunity"* and a *"unique military status"* immunity which is not available to a private employer contrary to 28 U.S.C.A., Sec. 2674. Should the federal courts be governed by an endorsement and an order made by an IBM punch card determined by the military and not determined by the courts as to whether or not governmental immunity is given solely by reason of a "leave" or "furlough" or other military label placed upon the authorization for travel? If this were the case, the United States could certainly avoid all its obligations of servicemen en route to new stations by such punch card systems and leave status.

Justice Black, on page 357 of the *Rayonier Inc. v. U. S. ante,* stated as follows:

> "The test established by the claims act for determining United States liability is to *whether a private person would be responsible for similar neg-*

ligence under the law of the state where the accident occurred."

He further stated:

> "It may be that it is 'novel and unprecedented' to hold the United States accountable for the negligence of its firefighters, but the very purpose of the Tort Claims Act is to waive the government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented government liability.
>
> " . . . When the entire burden falls upon the injured party, it may leave him destitute or grievously harmed. Congress could and apparently did decide that this would be unfair when the public as a whole benefits from the services performed by governmental employees. . . . There is no justification for this court to read exemptions into the act beyond those imposed by Congress."

This broad interpretation theory has further been upheld and other aspects of such Federal Tort Claims cases in the permitting of an action against a federal prison in *Richards v. U.S.*, 369 U.S. 1, 7 L.Ed.2d 492 (see Chief Justice Warren's excellent opinion), and in *Winston v. U. S.*, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805. *Should a wronged penniless widow with six children be treated any less favorably than a federal prisoner in her claim against the government?*

III. Washington Respondeat Superior Law Was Not Used by The Trial Court in the Ultimate Findings of Fact or in the Conclusions of Law.

A supposed Federal Common Law Test was in fact used.

The Circuit Court correctly set forth the rules as to

the law of the State of Washington as to the general rules of law, including those of both the predominate motive and/or "the dual purpose" but erred in the *application* of such law.

> "The fact that the *predominate* motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment. The purpose of serving the master's business actuates the servant to any appreciable extent the master will be liable and subject to the liability if the act is otherwise within the service."

Forsberg v. Tevis (1937) 191 Wash. 355, 71 P.2d 358; *McMullen v. Warren Motor Company,* 174 Wash. 494, 25 P.2d 99.

The Washington court has further made broad uses of the *dual purpose* doctrine in the leading case of *Carmin v. Port of Seattle,* 10 Wn.2d 139, 116 P.2d 338, and at page 154 states:

> "It is the established rule in this jurisdiction that where the servant is *combining his own business with that of his master or attending to both at substantially the same time,* no nice inquiry will be made as to which business the servant was actually engaged in when *the third person was injured;* the master will be held responsible unless it clearly appears that the servant could not have been *directly* or *indirectly* serving his master."

See also *Murray v. Kaufman Buick,* 197 Wash. 469, 85 P.2d 1061.

As to Respondeat Superior liability cases in Washington, these have been held to be subject to the same rules as a negligence case on respondeat superior as to private employers and where a servant is given consid-

erably more time than is necessary to travel his distance, the court has held the employer liable as in *Birchfield v. Department of Labor,* 165 Wash. 106, 4 P.2d 858 (1931):

> "The minority seems to lay considerable stress upon the fact of probability that the appellant leaving Longview when he did had several hours of time more than was necessary to reach the dock in Vancouver at the early morning hour appointed, and he would or might have gone to his home in the interim. We think that this is wholly beside the question and utterly immaterial. Any extra time which appellant might have used for his personal affairs would perhaps make that time and those affairs outside the course of his employment; but he was not injured during any such outside occupation. It was immaterial to his employer whether, of the intervening hours between the cessation of his work at Longview and its resumption at Vancouver, appellant used the first, the last, or any other portion to make the trip. It was *his duty to make the trip,* and while making the trip at any time during the interval, he was in the course of his employment."

This was a case wherein the employee had used his own automobile without reimbursement to travel some substantial distance between port cities in connection with ship work in the State of Washington, and certainly the same rule should apply in connection with this case.

The Washington rule for the test of the scope of employment of respondeat superior is set forth in the case of *Green v. St. Paul Mercury,* 51 Wn.2d 469, 573, 320 P.2d 311 (1958), and the court holds on page 573:

> "The test adopted by this court for determining whether an employee is *at a given time in the course of his employment* is whether the employee was at the time engaged in the *performance of the duties required by him by his contract of employment,* or by *specific direction of his employer,* or as is sometimes stated: *'whether he was engaged at the time in the furtherance of the employer's interest.' Lunz v. Department of Labor & Industries,* 50 Wn.2d 273, 310 P.2d 880 (1957)."

The case of *Bell v. U. S.* (1961) 366 U.S. 393, 81 S.Ct. 1230, 6 L.Ed.2d 393, holds an enlistment in the Armed Services is in the nature of a *contract of employment.* See especially 10 U.S.C. 501 as to the enlistment oath which is in the contract form and is Exhibit 11 admitted (RII-49). The *scope* of employment as distinguished from the *fact* of employment is thus still determined by *state* law.

IV. The Employer Is Liable in Washington for Transfers of an Employee to a Distant Town and There Is a Presumption in Favor of the Injured Third Person Where the Master Set the Servant in Motion, Especially in Death Cases.

Rice v. Garl, 2 Wn.2d 403, 98 P.2d 920, is a case wherein Standard Oil Company was held liable for an employee taking his own car to his employment at a long distance and transportation was provided for the others of his working crew on more than a local journey. Washington thus makes the employer liable for long distance travel while distinguishing short trips to and from local residences within the general vicinity of the residence. See also *Carlson v. Collier & Son Corporation,* 190 Wash. 301, 67 P.2d 842.

The Washington law was disregarded both by the District Court and by the Circuit Court of Appeals in terms of the judicial subtlety involved by Judge Denman in the case of *Kennedy v. U. S.* (9 CCA 1956) 230 F.2d 674, who commented at page 675:

> "Since the appellant admits that at the time of the accident, Sgt. Mayer was 'acting within the scope of his employment as a member of the military forces of the United States,' the Washington law cited to the proposition that an employer is not liable for the acts of an employee living in the vicinity of his place of employment and going there to and from his home are inapplicable."

It should be noted that the exact quotes that the judge used define the words "line of duty" which is a separate determination for the individual service. This is judicial subtlety by reason of 28 U.S.C., Sec. 2671, where the phrase, *"line of duty,"* is defined as *"acting within the scope of his office or employment"* in the case of *"as a member of the military forces,"* and obviously the court meant *"acting in the line of duty" as to the Army,* nothing more (See Appendix). The "scope of employment" as distinguished from "line of duty" was always a contested issue as has been indicated in terms of the briefs and records in the *Kennedy* case and the appeal otherwise has no meaning and would have been dropped. See also the comment thereon in 19 NACCA Law Journal, page 248, stating a comment to the circumstances of such serviceman:

> "He was consciously proceeding to his assigned post, a course of activity designed to serve the government's end and even though he was still on vacation and not yet traveling on his travel time, the

predominate purpose to get to the California post 'actuated him to an appreciable extent.' "

Finding No. 37 on the part of the District Court of *"some benefit" for morale purposes* (RI-59) and the circumstances of a "definite benefit" in favor of the United States upon a new man being transferred, exceeds the test of the "nice inquiry" which the "dual purpose" rule would not permit in the State of Washington. Washington has been very liberal in favor of injured third persons, especially where a death is involved. See *Wilson v. Times Printing Company* (1930) 158 Wash. 95, 290 Pac. 691, where an employee of a newspaper company, in his own car and obtaining no reimbursement for travel for his auto, caused death to a third party, and the company was held liable for the death. See also the case of *Fleming v. Star Publishing Company* (1938) 195 Wash. 395, 81 P.2d 293, page 408, stating the major thing the court considers is *the right under the contract to control* the manner or mode in which the work was done. This contract here is "to obey;" see 10 U.S.C.A. 501 in Appendix after Grantham received orders and accepted them.

In *Sells v. Sorenson,* 132 Wash. 318, 73 P.2d 798, the word "employee" has the same legal significance as the word "servant" for respondeat superior liability in the State of Washington.

For the above reasons, this court should issue a Writ of Certiorari to the appropriate Ninth Circuit Court of Appeals for review of this case.

Respectfully submitted,

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